
(1993) 02 BOM CK 0123
In the Bombay High Court
Case No : Criminal Appeal No. 143 of 1989

State of Maharashtra

APPELLANT

Vs

Vithal

RESPONDENT

Date of Decision : 24-02-1993

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 323, 326

Citation : (1993) 3 BomCR 142 : (1993) CriLJ 2285

Hon'ble Judges : B.U. Wahane, J;A.A. Desai, J

Bench : Division Bench

Advocate : Mr. Agrawal, A.G.P, for the Appellant; Mr. Khamborkar, for the Respondent

Judgement

B.U. Wahane, J.—This appeal by the State is directed against the finding of acquittal recorded by the learned Addl. Sessions Judge, Akola for the offences punishable under sections 302, 326 and 323 of the Indian Penal Code.

2. In a gruesome incident of assault, two persons were killed while four were injured. The deceased and injured are the blood relations of the respondent/accused. Deceased Kusum was the sister-in-law being the wife of Ramesh the younger brother of the accused. Deceased Bandu was the son of Ramesh and deceased Kusum. Ramesh the brother of the accused. Namdeo the father of the accused and two kids Mamta and Vijay were injured. The said Mamta and Vijay are also the daughter and son of Ramesh and deceased Kusum.

3. The prosecution story, in brief, is as follows :

Namdeo (PW 7) an agriculturist owned 16 acres of land at village Shivan Khurd. He has two sons Ramesh and Vithal (respondent/accused). He also owns the house property in the village. Few months before the incident which took place between the night of 8th and 9th December 1987, in the residential house of Ramesh (PW 6) and Namdeo (PW 7), there was a partition between the brothers and the father. Each of the brothers was allotted four acres of land. Remaining

eight acres was kept in the name of Namdeo. The house property was also divided in two parts. Northern portion of the house was given to the accused Vithal and southern portion to Ramesh. As per the terms of the partition, Namdeo used to reside with Ramesh while Namdeo's wife used to reside with Vithal. Out of 8 acres of land standing in the name of Namdeo, he allowed his son Vithal to cultivate 4 acres of land for maintaining of his mother i.e. wife of Namdeo and Ramesh used to cultivate the remaining 4 acres of land standing in the name of Namdeo as Namdeo was residing with him. It was the desire of the accused Vithal that the land which he was cultivating for the maintenance of his mother, be mutated in his name and accordingly he persuaded his father. The father Namdeo did not agree with the proposal because he suspected that accused would not continue to maintain his mother after mutation. Therefore, there used to be bickerings between son and father. Vithal was disturbed and he assaulted his father Namdeo at once or twice. Due to quarrels and disputes Ramesh was fed-up and he decided to shift to other residence. Few days before the incident, accused sent his mother to Akola and wife and children except Sangeeta to his father-in-law's village.

4. On the fateful night, Ramesh and his son Vijay slept on one wooden cot. His wife (deceased Kusum) slept on another cot with son deceased Bandu and the third cot was occupied by Namdeo and daughter Mamta. The door of the room was latched from inside. The room was supplied with electricity. The electric meter and the main switch was installed in the portion occupied by the accused. However, that night the electric supply was not available in the house of Ramesh though it was available in the village. Therefore, that night Ramesh had lighted a kerosene lamp in the room. In front of the residential portion of Vithal and Ramesh, there was a court-yard and at the entrance of the Wada, there was a gate. Some portion of the court-yard was covered by tins. The door of the Wada was also latched from inside.

5. Between the night of 8th and 9th of December 1987 at about 3.00 a.m. when all the occupants were asleep, the accused entered the house of Ramesh by removing the latch which could be opened from outside and assaulted Ramesh, deceased Kusum, father Namdeo, Mamta and Vijay by means of crow bar (sabbal) article 23. Injured Ramesh woke up after getting a blow on his left ear. At that time, he has seen that accused was beating his wife with crow bar. She has raised cries. Ramesh tried to get up to obstruct the accused. However, as a result of injury, he could not get up. After assaulting Kusum, accused turned to Ramesh and dealt a blow again on his ear. Consequently Ramesh became unconscious. Namdeo also woke up after hearing the cry "Are Bap Re, Melo Re" given by Ramesh. He saw the accused in the house. Accused rushed towards Namdeo. He dealt blows on the head and other parts of the body of Namdeo. After hitting him, accused again turned towards Kusum and hit her. For some time he became unconscious. Bhimrao who is a neighbour was woke up by his mother after hearing the shouts from the house of Ramesh. He too heard cries raised by Ramesh and his wife Kusum and also noise of hitting. He gave call to

the neighbourers and thereafter he rushed towards the entrance of the Wada. The entrance door was latched from inside. He gave out a call in the name of Vithal but the door was not opened immediately. Therefore, Bhimrao and others extended threats to enter the Wada by removing the tins. After some time Vithal opened the entrance door. Bhimrao and others went inside the Wada. The accused told them that the door of the house of Ramesh is latched from outside. They asked him to open the door and see as to what had happened inside. Vithal went inside and on coming out reported that there is a pull of blood inside. Ramesh responded to the call given by the visitors from inside but not in words but painful voice. Therefore, the visitors went out of the Wada. By that time deceased Bandu a boy of 10 years came out from the room and as he was feeling cold went near the fire to warm himself. Bandu told that he was feeling cold. Vithal took Bandu from the fire place saying he would warm him. He took him inside the house. Other villagers after hearing hue and cry came to the spot and were sitting near the fire which was lit in front of the gate of Wada as it being the winter days. After short time, Vithal came out of the house and told them that Bandu died.

6. Injured Namdeo was warming himself near the fire. His clothes were stained with blood due to bleeding injuries on his head. Out of those five seven persons who were sitting near the fire, Rambharti (PW 8) asked Namdeo as to who had hit him. Namdeo told him that he was assaulted by the accused Vithal.

7. Maroti Barapatre had gone to the place of incident along with Punjab Punjaji and Pundlik Golam who had come to his house to inform him about the horrible events in the house of Ramesh. He went to the house of Ramesh along with others and found the wife and son of Ramesh lying dead on two different wooden cots. On the third wooden cot, he found Ramesh in semi-conscious state due to severe injury on his ear. He was demanding water and water was served to him. A kerosene lamp was burning inside the room. Thereafter, Maroti along with the Kotwal went to Mamargaon Police outpost. He lodged report of the incident with the Head Constable who scribed it as per his say. The report is at Exh. 8. In the oral report Exh. 8, Maroti expressed his suspicion to the effect that on account of dispute over the field Vithal assaulted Ramesh, his father Namdeo, sister-in-law Kusum, nephew Bandu etc.

8. P.S.I. Shri Bhongle and A.S.I., Shri Bhingare were present at the police outpost. Shri Bhongle prepared the occurrence report at the instance of Maroti and sent the same along with A.S.I., Shri Bhingare to Dhanaj Police Station where A.S.I., Shri Raut registered the offence u/s 302 of the Indian Penal Code at Crime No. 13/87 against Vithal. Shri Bhongle proceeded to village Shivan Khurd for investigation. He drew inquest panchanama of the dead bodies and sent injured Ramesh, Namdeo, Mamta (a girl of 3 years) and Vijay (a boy of 6 years) to the rural hospital, Kamargaon for treatment. The blood-stained articles were seized from the spot. Accused was also arrested. At the instance of the accused, a crow bar (sabbal) article 23, a suit case containing articles belonging

to deceased Kusum and blood-stained pajama were recovered from the heap of fodder from the house of the accused. All the incriminating articles seized during the investigation were sent to the Chemical Analyser, Nagpur together with blood-stained clothes of Ramesh and Namdeo.

9. Injured Ramesh (P.W. 6) and Namdeo (P.W. 7) were referred to the main hospital, Akola. After completing the investigation, charge sheet was filed against the accused in the court and the offence being triable by the Sessions Court it was sent to the Sessions Court for trial.

10. The accused was charged for the murder of Kusum his sister-in-law and nephew Bandu. He was charged for causing serious injuries to Namdeo the father of the accused and Ramesh the brother. Accused was also charged for causing hurt to Mamta and Vijay the daughter and son of Ramesh. The accused denied his complicity. His specific defence is that due to quarrel and strained relations with his father Namdeo and brother Ramesh, they have falsely implicate him.

11. The learned Additional Sessions Judge, Akola giving benefit of doubt exonerated the accused of all the charges and acquitted him. The learned Additional Sessions Judge discarded the prosecution story mainly on the ground that the medical evidence is contrary to the ocular testimony. Similarly, he rejected the evidence of Ramesh and Namdeo on the ground that though they were in a position to speak and disclose the name of assailant, they did not disclose the incidence and name of the assailant till their statements were recorded on 11th December, 1987. Consequently, he disbelieved the evidence of Rambharti (P.W. 8) and Maroti (P.W. 2) and also disbelieved the discovery of a crow bar article 23, suit-case and pajama.

12. The State preferred this appeal challenging the acquittal of the respondent/accused. The counsel appearing on behalf of the State submitted that the learned Additional Sessions Judge adopted inconsistent and unsound standard without making any real efforts to assess the credibility of the evidence given by the father and brother of the accused and also other prosecution witnesses.

13. With the assistance of the learned advocates of both the sides, we have gone through the evidence, documents and judgment.

14. Most of the part of the investigation is either admitted or not much seriously disputed by the accused. Kusum died due to shock as a result of multiple fracture to the skull and injuries to the brain while Bandu died due to asphyxia due to strangulation. The fact of homicidal death of Kusum and Bandu is not disputed. The injuries sustained by Ramesh, Namdeo, Mamta and Vijay are not challenged. It is not disputed that the incident had taken place in the house of Ramesh. It is also not disputed that during the fateful night a kerosene lamp was burning as there was no electric supply on that day in the house of Ramesh. Similarly, it is not the case of the accused that it is the case of mistaken identity due to non-availability of sufficient light.

15. Keeping in view of the rival submission, we propose to scrutinize the evidence. Before discussing the evidence we propose to mention the medical evidence regarding the injuries found on the persons of deceased and injured victims. Dr. Rahate (P.W. 11) examined deceased Bandu a boy of 10 years on 9-12-1987 and performed the autopsy. Doctor Rahate found pupils dilated, lips were blue, tongue protruding and swollen. Dr. Rahate noticed the following injuries on the dead body of Bandu.

1. Abrasion on left side chin 1/2" x 1/4".

2. There were soft red bruises on front of neck multiple in number on both lateral sides of the neck. Both the injuries were anti-mortem. Further, doctor found larynx congested. Frothy blood and mucus was present. Cartilage of the hyoid bone was fractured. He also found the finger marks on the neck on the front side. Lungs were found congested. Right chambers of heart were found full of blood and the left were found empty. According to doctor the probable cause of death was asphyxia due to strangulation. Notes are at Exh. 39.

16. Dr. Narayan Rathod (P.W. 10) conducted the post-mortem on the dead body of Kusum wife of Ramesh on 10-12-87 between 9 and 10 a.m. and found the following external injuries.

1. Lacerated wound over front parietal region. Vertically placed 2" x 1" by bone deep.

2. Abrasion on right arm laterally size 1" x 1" x skin deep.
vertically placed.

3. Compound fracture of right elbow joint.

4. lacerated wound on right cheek 1/2" near right eye laterally, obliquely placed size 1" x 1/2" x bone deep.

5. lacerated wound over right cheek zygomatic region horizontally placed size 1" x 1/2" x bone deep.

6. Contusion on left wrist joint posteriorly 1/4" x 1/4".

under colm. 18. I have noted the injuries found on the dead body as under :-

1. Fracture of the front parietal bone.

2. Fracture of the zygomatic bone right side.

3. Fracture of the supra condylar bone of the right elbow joint.

The injuries mentioned in colm. 18 correspond relevant injuries under colm. 17.

All the injuries were found mentioned above were ante-mortem. On internal examination I had found following injuries. Head fracture front parietal bone. Skull-fracture front parietal bone. Vertically placed length 5".

ii. Crushed bony injury to zygomatic bone right side. Brain pale and lacerated wound on the frontal region size 1 1/4" vertically placed. Chambers of heart were found empty.

According to doctor, the death of Kusum was due to shock as a result of multiple fracture skull and injury to brain and severe external haemorrhage.

17. Doctor Niwane (P.W. 13) examined Ramesh, Namdeo, Vijay and Mamta on 9-12-1987 at rural hospital Kamargaon. Injured Ramesh had following external injuries.

1. Injury incised in nature to left ear at two places, separating pinna of the ear extending from periphery to centre 1 1/2" in length and the other 1" in length separating cartilages, bleeding was found present. Lower portion of injury extended to mastoid and skin deep.

2. Contusion left 2nd inter costal space 2" x 1" tenderness over clavicle present.

3. Patient was complaining pain in neck. Tenderness over servical spine present.

According to doctor, injury No. 1 was caused by sharp object and injuries 2 and 3 might have been caused by hard and blunt object. Injury certificate is at Exh. 54. Article 23 was referred to the doctor and his opinion was sought whether injury No. 1 i.e. incised in nature could be caused by Article 23. Doctor examined the crow-bar article 23 and gave his opinion that the square end of the crowbar having pointing edge was likely to produce injury No. 1. The rest also could be caused by the said article.

Doctor found the following external injuries on the person of injured Namdeo to whom he has examined on the same day.

1. Incised wound on front parietal region 2 1/4" x 1/4" skin deep bleeding present, wound found sagittal suture, bone of skull was visible.

2. Incised wound in front of left (Right) ear obliquely placed 2 1/2" x 1/2" in centre, skin and muscle deep extending from upper border of right ear, protrude gland, bleeding was present, bleeding from ear also present.

3. Swelling over right parotid region, extending to lower border of the jaw, about 3" x 4" with haematoma inside, Movements of jaw were restricted and painful.

4. Contusion left inter costal space in clavicle 2" x 1" tenderness over left clavicle region.

5. Contusion on right shoulder 2" x 2" and minimal abrasion over it size 1/4" x 1/4".

Injuries 1 and 2 could be caused by hard and sharp object. Injuries 3 and 5 could be caused by hard and blunt object. Doctor issued injury certificate vide Exh. 55. To this doctor, the crow-bar article 23 was referred and a query was made whether article 23 could produce the incised wound as seen on the person of

Namdeo. Doctor after examining the weapon and the injuries, he opined that article could produce incised wound by the square end and other injuries by the rest of the part of the said article. Namdeo was also referred to the District Hospital, Akola for taking X-ray. Doctor examined X-ray plates Exhs. 41 to 44 pertaining to the patient Namdeo. X-ray plate Exh. 41 shows evidence of fracture of right mandible, plate Exh. 42 display fracture of left clavicle crack fractured.

On the same day doctor examined Vijay s/o Ramesh and found the following injuries.

1. Contusion on upper side of back, across upper scapular region about 6 to 7 inches x 2" reddish, blackish, colouration over skin seen horizontally.
2. He was complaining of pain on movement of neck. No marks of injuries were seen on the neck.

According to the doctor, injury No. 1 could be caused by hard and blunt object. According to him, article 23 could cause the injury.

Mamta d/o. Ramesh was also examined and doctor found the following injuries on her person.

1. Contusion on forehead and left temporal region. Swelling on left upper eye-lid, haematoma, greenish discoloration present over left part of frontal region, and left upper eyelid, pupils of eyes were found of normal size and reacting to light.

Doctor examined article 23 and injuries which he has found on the person of Mamta, opined that injuries could be caused by hard and blunt object like article 23. Mamta was aged about 3 years.

18. The learned trial Judge has disbelieved the evidence of two injured victims viz., Namdeo and Ramesh who were injured in the same incident along with two deceased and two injured kids, on the ground that it is being contrary to the medical evidence and their conduct being unnatural in not disclosing the name of the assailant and the incident of assault immediately to the person assembled in the Wada. P.W. 6 Ramesh who is the real younger brother of the accused has deposed that on the fateful night his daughter Mamta was sleeping with his father Namdeo, son Vijay was sleeping with him and deceased Bandu was sleeping along with his mother deceased Kusum on separate cots. That night though the power supply was available in the village, it was not available in his house and, therefore, he lighted a kerosene lamp. He woke up on getting a blow on his left ear. He had seen the accused beating his wife with a crow bar. She raised shouts. He tried to get up to obstruct the accused but on account of injuries he suffered, he could not get up. The accused assaulted his wife. After hitting his wife, again accused hit him and thereafter he fell unconscious. He learnt about the death of his wife and son when he was in the hospital. He specifically stated that the planks of the door of his house used to give way by inserting hand and thereby removing latches. He identified Article 23 is the same by which he was assaulted. Article 23 belongs to the accused as it has gone to

his share in the partition. He identified Article 9 the suit case that of this wife. In the cross-examination, nothing has been brought to discard his testimony. Further, in cross-examination he stated that Article 23 was used by them prior to the partition. He specifically deposed that he could regain consciousness after about 2 days. A suggestion was made to him that on the following morning of the incident, he had regained conscious and he denied the suggestion. We do not find any infirmity, material omissions or contradictions in the evidence to discard his evidence regarding the assault on him and his wife Kusum.

Namdeo (P.W. 7) the father of the accused deposed about the partition and refusal to mutate the land which was being cultivated by the accused for maintenance of his mother i.e. wife of Namdeo. According to him, the accused Vithal has sent his wife and children to Bham and mother i.e. wife of Namdeo to village Pinglai. Only Sangeeta a daughter of Vithal aged about 12 years was in the village. A kerosene lamp was burning in the room as there was no electric supply to their residential room that night. During the night, he woke up on hearing cry "Are Bapa Melo Re" given by Ramesh and he saw the accused inside the house. He rushed at him and dealt a blow by subbal on his head. According to him, accused dealt for blows with subbal. After hitting him the accused hit Kusum the wife of Ramesh. He became unconscious. After some time he regained conscious and got up from the cot and went out of Wada and warmed himself at the fire lit in front of the entrance. Bandu his grand son come there to warm himself. The accused took him from the fire place saying he would warm him and thus took him to his house. One Rambharti (P.W. 8) was also sitting near the fire along with 5-7 others. Rambharti asked Namdeo as to who had hit him to which he told him that the accused assaulted him. Thereafter, he was brought to Akola Hospital in the morning. He identified the crowbar used by the accused Vithal which is Article 23. In the cross-examination he admitted that his statement was recorded in the hospital.

19. The learned Additional Sessions Judge, Akola rejected the testimony of Ramesh and Namdeo only because they did not immediately disclose the incident and name of the assailant. According to the learned Judge, it is unnatural that two victims will not disclose the name of the assailant. Similarly their ocular testimony is contrary to the medical evidence. Both these witnesses stated that Kusum was assaulted by crow-bar. We have carefully perused the evidence of both the eye-witnesses. It is pertinent to note that Doctor Narayan Rathod (P.W. 10) who performed the autopsy on the dead body of deceased Kusum found lacerations, abrasions, contusions and fractures. He specifically opined that all the injuries could be caused by Article 23, as noted in the Post-mortem report Exh. 37. The defence denied to cross-examined Dr. Narayan Rathod. Under the circumstances, there was no reason for the learned Additional Sessions Judge to doubt the veracity of Ramesh and Namdeo regarding the assault on deceased Kusum by the accused with the crow-bar Article 23.

20. Doctor Niwane (P.W. 13) examined victim Ramesh and Namdeo. Besides

other injuries, one incised injury was noticed to the left eye of Ramesh (P.W. 6) and two incised injuries were noticed on the person of Namdeo (P.W. 7). Incised injuries which were noticed on the person of Ramesh and Namdeo by Doctor Niwane (P.W. 13) could be produced by the weapon Article 23.

However, in the cross-examination doctor stated that the square end of the Sabbal Article 23 in its sides is capable of causing cutting. He further stated that incised wounds have fine regular edges. On the basis of this evidence, the learned trial Judge discarded the ocular testimony of two injured victims holding it contrary to medical evidence. We have given our conscious thought and found that the learned trial Judge fell in error in discarding the cogent, reliable and unimpeachable ocular testimony of Ramesh and Namdeo.

21. There is no doubt that in a case where the injuries are contrary to the medical evidence, benefit goes to the accused. Suppose in a case where the ocular testimony is that the victim was assaulted by the sticks while doctor noticed incised wound in such cases the medical evidence being contrary to the ocular testimony definitely benefit would go to the accused. But, in the case before us, it is not the case of the nature. All the injuries noticed on deceased Kusum were produced by Article 23 and to that effect deposed by Ramesh and Namdeo. The defence declined to cross-examine the doctor on this aspect. Similarly, Ramesh and Namdeo both were assaulted by the crow-bar Article 23. Doctor also deposed that all the injuries could be caused by the square end having pointed edge of Article 23. Where the direct evidence is cogent, reliable and unimpeachable, the medical evidence cannot override.

22. We are fortified by the observations of their Lordships in a case of *Karnail Singh and Others Vs. State of Punjab*, . Their Lordships held that;

"Where it is proved beyond doubt from the direct evidence of the eye-witnesses that the accused committed murder by firing gun shots, the inconsistency between the opinion of expert and the prosecution story relating to distance from which gun shots were fired carries no weight."

23. In a case of *Vasudevan Vs. State*, in which their Lordships observed that (at p. 87 of Cri. L.J.);

"In a case where there is direct testimony of physical violence, the value of medical evidence adduced by the prosecution in support of its case is only corroborative in that it proves the nature of injuries, the cause of death and that the injuries could have been caused in the manner alleged. Ordinarily the use which the defence can make of medical evidence is to prove by it that the injuries could not possibly have been caused in the manner alleged or death could not possibly have been caused by the injuries sustained. In a case where there is conflict between the medical evidence and the ocular account of witnesses, the Court can either believe the prosecution witnesses without reservation or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical evidence. Medical evidence

cannot override cogent, and convincing testimony of eye-witness. It is only in a case where the medical evidence goes so far as that it completely rules out all possibility that injuries could take place in the manner alleged by the prosecution, such evidence constitutes an important factor or circumstances in assessing the direct evidence and in deciding whether the direct testimony could safely be accepted.

The mere fact that in a murder case the evidence of eye-witnesses is not consistent with the medical evidence will not by itself render the direct testimony unreliable."

24. In the instant case, the offence is committed in the dead of night and when all the victims were asleep. After receiving a blow Ramesh got up. Same is the case with Namdeo. Under the circumstances, it is difficult to give mathematical descriptions of the incident. One end of the crow-bar was having square shape and sharp edge. The possibility cannot be ruled out that before the assault, the accused might have sharpened the edges and immediately after the assault, before concealing the same in the heap of fodder he might have slightly made the end blunt. Doctor Rathod (P.W. 10) and Doctor Niwane (P.W. 13) who have seen the Article 23 and injuries on the victims specifically stated that the injuries could be produced by Article 23.

25. The learned trial Judge while discarding the evidence of Ramesh and Namdeo both the injured observed in para 12 of its judgment that the witnesses have axe to grind against the accused. Similarly, the disclosure by Namdeo about Vithal being an assailant, near the fire place is very much unacceptable. Likewise, merely because there were bickerings between Namdeo the father of the accused and the accused, the father and real brother will not involve the accused in such a ghastly and gruesome act screening off the real assailant. On the contrary, according to us, Ramesh and Namdeo not only blood relations but being injured would add to value of their evidence because they would be definitely interested in getting the real culprit to book rather than innocent persons punished. After a close scrutiny of the evidence of Ramesh and Namdeo, we find it convincing and reliable.

26. The learned trial Judge has made a mountain out of mole by giving much importance to the delay of the statements recorded by police on 11-12-87. The learned counsel for the respondent/accused urged that the conduct of the two eye-witnesses Ramesh and Namdeo was unnatural in as much as they did not rush to help each other and disclosed the incident to anyone though they were conscious. According to Shri Khamborkar, the learned counsel for the respondent/accused, this render the entire prosecution story improbable. We do not think that the conduct and behaviour of these two eye-witnesses was either unnatural or improbable. It is rightly said that even a man's prowess may become pusillanimous by witnessing a serious crime. Be it may be, the accused started assaulting everyone and did not allow anyone to get up and go to rescue of others. Ramesh specifically deposed that while his wife was being assaulted by

the accused he tried to get up but due to injuries he could not get up. Similarly, Namdeo also deposed that as soon as he heard hue and cry, he tried to get up but he was assaulted by the accused. The entire incident of assault on them and deceased Kusum was by crow-bar. The requisitions were given to Doctor Niwane (P.W. 13) and a query was made whether Ramesh and Namdeo were in a position to give statements. In respect of Ramesh, doctor opined that Ramesh is unable to speak on account of injuries to the neck and clavicle. Doctor made an endorsement about the same on the reverse of the requisition. Similarly, he replied the query made in respect of Namdeo and gave an endorsement on the reverse of the requisition to the effect that he is not in a position to give statement because his jaw was restricted and painful. Under these circumstances, how Ramesh and Namdeo could disclose the name of assailant to the persons assembled in the Wada. It is specific case of Ramesh that after receiving the assault he became unconscious. It is the case of the prosecution too that when he was shifted to the hospital, he was unconscious. Namdeo even after receiving the bleeding injuries could go to the place near the fire which was near the entrance gate of the Wada. People assembled there, asked him about the assault on him and he replied that his son Vithal assaulted him.

Rambharti (P.W. 8) has specifically deposed that in the early morning he again went near the fire place in front of Wada. At that time he found Namdeo father of Ramesh at the said fire. His turban had drenched in blood. He enquired him as to what had happened and who had hit him. He told him that his son Vithal had hit him. He told him that his son Vithal had hit him and he acclaimed (blamed ?) about his fate. On the very morning Rambharti's statement was recorded by police. Namdeo has used the word "it was his fate". The learned counsel of the accused submitted that thereby Namdeo expressed his ignorance about the incident. On the contrary, according to us Namdeo blamed to his fate. This expression indicates that what a unlucky man he is, who has seen murderous assault not only on him but to other members of his family and that too by his son. We do not find any reason to discard the evidence of Rambharti.

27. The learned trial Judge also not accepted the evidence of Bhimrao it being found unnatural. He discarded the evidence of Bhimrao on the ground that he and other villagers made entry in Wada but did not enter into the room of Ramesh to see what actually happened. Similarly, he found fault in asking accused Vithal to open the room which was latched from outside. We perused the evidence of Bhimrao and circumstances which had been considered by the learned trial Judge. According to us, the approach of the learned trial Judge is perverse. P.W. 3 Bhimrao stated that he was woken up by his mother at about 2.30 a.m. after hearing some noise from the house of Ramesh. The noise of cries were raised by the wife of Ramesh and her children. He hears the noise of hitting as well (Dhub-dhub). He awakened the neighbours and rushed towards the entrance of the Wada. Bhimrao was accompanied by other villagers. The entrance gate of the Wada was found closed from inside. Therefore, he and others gave a call in the name of Vithal. For considerable time, the door was not

opened. Bhimrao and others expressed their determination loudly that if the door is not opened they would remove the tins and enter into the Wada. After this only, Vithal opened the door. All took Vithal up to the house of Ramesh. Vithal told them that the door of the house of Ramesh was latched from outside. They asked him to open it. He removed the latch and entered in the house of Ramesh. All remained outside in the Court-yard. Vithal told them that there was a pool of blood inside and, therefore, none of the persons including Bhimrao entered into the room. Bhimrao further deposed that Bandu a boy of 10 to 11 years of age came out of the room. He was feeling cold and thus came near the fire place. Thereupon, Vithal told that he would warm him saying so. He took Bandu inside his house for warming him. Some members went to call other villagers. After some time Vithal came out of the house near the people who were near the fire and told them that Bandu died. There is nothing strange in the conduct of Bhimrao and others choosing to ask Vithal to go inside and remain outside the room and set out fire near the entrance gate of the Wada to warm them it being winter days. There is no set rule how to behave in a particular situation. Different people react in different ways in situations of emergency and crisis. However, the learned counsel for the respondent/accused submitted that there are omissions and the evidence is discrepant and, therefore, the testimony of Bhimrao was rightly rejected by the learned trial Judge. We do not find any material infirmities in the evidence of Bhimrao to discard his testimony. In the depositions of the witnesses there are always normal discrepancies, however honest and truthful they may be. These discrepancies are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence. The learned Addl. Sessions Judge however, discarded their evidence on the ground of certain discrepancies. In our opinion, these discrepancies are minor and not of serious nature but were given unduly exaggerated importance not warranting its rejection by him for that reason alone.

28. Maroti Barapatre an agriculturist reported the matter to the police outpost at village Kamargaon. Ex. 8 is the oral report recorded by Head Constable Bongale. Maroti stated that between the night of 8th and 9th of December, 1987 at about 3 or 4.00 a.m. he learnt about the incident through Panjab Punjaji and Pundlik. He along with them has gone to the place of incident and seen the horrible site. He found the wife and son of Ramesh lying dead on two different cots. On the third cot, Ramesh was lying in semi-conscious condition having severe injury on his ear. He was demanding water. Water was served. Namdeo was also lying there. He too also suffered injuries. A small lamp of kerosene was burning inside the room. According to Maroti, he enquired from accused Vithal who was warming himself at the fire outside the Wada, about the incident. However, he expressed his ignorance and stated that he does not know anything as he was asleep. Therefore, it is clear that the F.I.R. is based on the facts which Maroti had seen. It is apparent from the evidence of Maroti that he was one of the panch at the time of partition between Namdeo and his sons. One thing, however, is

certain that almost immediately after the incident, Maroti suspected accused Vithal as an assailant and responsible for the death and injuries on other victims. His evidence was criticized on the ground that his report is not based on his personal knowledge but he expressed his suspicion. Police also moved the wheels of the investigation on the basis of suspicion and investigating agency prepared a false case against the accused. According to us, F.I.R. leads assurance to the evidence of the injured eye-witness i.e. Ramesh and Namdeo.

29. The prosecution has brought additional circumstance of discovery of Article 23 a crow-bar, a suit case and pajama of the accused on memorandum Exh. 17. On 9-12-87 at about 1.30 p.m., the accused made voluntary statement to discover the crow-bar, suitcase of deceased Kusum and his pajama from the place where he concealed. He took the panchas and police to his house and took a crow-bar, suitcase and pajama stained with blood from the heap of dried stalks of Mung. Those articles were seized vide recovery panchanama Exh. 18. The learned trial Judge discarded the evidence being of no use in view of the medical evidence. No other reasons have been assigned by the learned trial Judge to discard the evidence of the witnesses as to the discovery of the articles. As per the Chemical Analyser's report, the crow-bar Article 23 and pajama Article 9 had human blood stains.

30. The learned counsel for the respondent/accused submitted that no blood of the group of the deceased or injured was found on the weapon Article 23, the crow-bar and pajama and, therefore, it cannot be connected with the accused. Omission to found blood stains on the weapon is immaterial and it does not weaken or cast a doubt on the prosecution case because the oral evidence of the eye-witnesses is trustworthy and acceptable. Criticism relates to matters which are both insignificant and immaterial on the facts and circumstances of this case. They do not affect in any way the truth of the main elements of the prosecution story. The eye-witnesses having believed, these points lose all importance.

31. Lastly, from the evidence led by the prosecution, it is apparent that there was a motive on the part of the respondent/accused to commit the crime. Admittedly, there was a partition between the father and sons. Four acres of land had gone to the share of Ramesh and Vithal each. Eight acres of land was in the name of Namdeo. In the partition, it was decided that the father will reside with Ramesh while the mother with the accused Vithal. For the maintenance of his wife, Namdeo allowed the accused Vithal to cultivate four acres of land. However, the accused Vithal persisted that the four acres of land which he was cultivated, be mutated in his name. Namdeo declined to do so, because he suspected that as soon as the land is mutated in his name, the accused will not continue to maintain his mother i.e. the wife of Namdeo. Ramesh specifically deposed that there were constant bickerings and quarrels between Vithal and father Namdeo. On two or three occasions, the accused had beaten his father Namdeo. He was harassing Ramesh also by grazing his cattle's in his field. Once, the accused Vithal had committed a theft of 20 kilograms of cotton from Ramesh's house.

Further, Ramesh stated that he fed up due to quarrels and harassment by the accused and, therefore, he expressed his desire to Radheshyam (P.W. 5) to reside separate. It is, thus, clear that the accused Vithal was greedy and no doubt he wanted to grab the property of his father and brother Ramesh. From the ghastly act to extinguish the entire family, the intention is writ large.

32. Besides the ocular testimony of the witnesses discovery of the crow-bar Article 23, pajama Article 9, suitcase of deceased Kusum, other circumstances discussed hereinafter speak volumes and lead to the irresistible conclusion that the accused is an assailant and responsible for two deaths and causing injuries on others.

(i) About two days prior to the incident accused Vithal had reached his wife and children to his father-in-law at village Bham. His mother had also gone to village Pinglai. Both the brothers were living in the same house but having a partition wall in between.

(ii) According to Ramesh as deposed in para 4 of his deposition, the planks of the door of his house used to give way for inserting hand and thereby removing the latch. This witness further stated that on that day he himself had latched the door of his house from inside before going to bed. The accused Vithal being his real brother, he must be knowing how to open the inside latch from outside.

(iii) Article 23 - the crow-bars belongs to the family as it was being used by Ramesh and his father Namdeo, but in partition this article was given to accused Vithal.

(iv) Ramesh specifically deposed that during that fateful night though the power supply was available in the village, it was not available in his house and, therefore, he lighted kerosene lamp. The electric meter is fitted in the part of the house occupied by the accused Vithal. According to Pundlik (P.W. 16), on 9-12-87 at about 4.00 p.m. he along with others went to the house of Vithal. In their presence police removed the fuse-cap in the installation inside the house of the accused Vithal. They found that there was no fuse wire fixed there at all. Even the parts of the fuse wire were not found at the screws holding it in the cap and on replacing the cap, supply was found in tact. To that effect, the panchanama was recorded vide Exh. 65.

(v) According to Maroti (P.W. 2) when he went to the Wada of Namdeo, he found Vithal warming near the fire. After visiting the room of Ramesh and found his wife and son dead and others injured, he enquired from Vithal about the incident to which Vithal expressed his ignorance stating that he was asleep. It appears to be abnormal conduct on the part of the accused.

(vi) It is transpired from the evidence of Bhimrao that after hearing shouts, he and other neighbours rushed to the Wada. The residence of Vithal and Ramesh are separate only by a wall. Under the circumstances it is difficult to believe that the attention of the accused was not attracted in spite of the shouts were raised

by Ramesh, his wife deceased Kusum, Namdeo and children.

(vii) Bhimrao (P.W. 3) stated that Vithal took the child Bandu inside his house for warming him and after sometime he came out of the house and told that Bandu died.

(viii) Namdeo (P.W. 7) also deposed that when Bandu had come near the fire to warm himself, Vithal had taken Bandu from the fire place saying that he would give warm and took him to his house. Subsequently, Bandu's dead body was found on the cot. Doctor stated that Bandu died due to asphyxia by strangulation. Thus, irresistible inference is that Vithal caused death of Bandu by strangulating him, The accused Vithal was thereafter frequenting from the fire place and going inside the Wada without any remorse on his face in spite deaths of his sister-in-law and nephew and injuries on his father, brother, another nephew and niece.

(ix) The room of Ramesh was found chained from outside. The only entrance gate was found chained from inside. The outsider would not chain the room from outside keeping the entrance gate chained from inside. Nobody can escape there being no other way to go out. This circumstances also points towards guilt of the accused.

(x) The human blood was found on his pajama Article 9.

33. The circumstances discussed above and the conduct of the accused was so knit together as to make a net work of circumstances pointing only to his guilt. Considering the oral as well as circumstantial evidence, the prosecution case against the accused has been established beyond all reasonable doubt. For the foregoing reasons the accused has committed the murder of Kusum causing injuries on her person by means of crow-bar article 23 and committed the murder of Bandu a boy of 10 years strangulating him. Thus, the accused has committed the offence punishable u/s 302 of the Indian Penal Code. Similarly there was a murderous assault on Ramesh - the brother of the accused and on Namdeo the father of the accused. Both received grievous injuries and, therefore, the accused has committed the offence punishable u/s 326 of the Indian Penal Code. During the assault, son Vijay and daughter Mamta aged about 6 and 3 years respectively also received injuries and, therefore, the accused has committed the offence punishable u/s 323 of the Indian Penal Code. Though it was a murderous assault on Ramesh, Namdeo, Vijay and Mamta, providence saved them. The act of the accused was brutal. The accused had no love and affection even for the youngers. The act was designed to extinguish the entire family of his brother and even his father and thereby to grab the entire property. The attack was deliberate and preplanned and, therefore, he attacked the victims in the dead night while all the victims were asleep. The brutality is writ large.

34-35. On the point of sentence we have heard the learned counsel for both the parties. They have invited our attention to the decisions in Shankaria Vs. State of Rajasthan, in Bachan Singh Vs. State of Punjab, and Machhi Singh and Others

Vs. State of Punjab, in which the principles and guidelines are laid down by their Lordships. There is unanimity at the bar that ultimate punishment could be awarded in a criminality of rarest of its own kind. Life Imprisonment is a rule whereas capital sentence of death is an exception and it depends on the fact and circumstances of the case.

Shri Agarwal, the learned Additional Public Prosecutor submitted that the crime in the account of the accused is gruesome and heinous. Immediately before the incident there was no provocation or even casual altercation. Accused was coolly planned the commission of the crime. He was thrust of the blood of his blood relations and, therefore, attempted to extinguish the entire family of his brother and also his father. No extenuating circumstances have been established to justify the infliction of the lesser penalty u/s 302 of the Indian Penal Code. Under the circumstances only extreme penalty of death is permissible.

On the contrary, Shri Khamborkar, the learned counsel for the respondent/accused submitted that the accused was in financial difficulties and therefore, he entered into an agreement on 17-8-1987 with Radheshyam (P.W. 5) to sell his two acres of land. Admittedly, there were family feuds over the property. Although the crime attended with extra-ordinary cruelty, considering his young and malleable age, reasonable prospect of reformation are probable. Since after the acquittal no untoward incident had taken place. After a long time if he is sentenced to death, the entire family will not only be disturbed but ruined. Similarly, he is not a habitual offender or he has given to chronic violence. These catena of circumstances bearing on the offender call for the lesser sentence.

36. We have to consider whether life or death ? Two deaths of sister-in-law and nephew a boy of 10 to 11 years and murderous assault on his father Namdeo, brother Ramesh, nephew Vijay and niece Mamta aged about 3 years are indeed terrible. Survival of others was sheer a grace of God. Criminal design of the accused had a definite plan to eliminate the victims. Thus the act of the accused in causing murder of two and injuring four was no doubt gruesome and revolting. It is rightly said that "the lust of booty and thrust of hate makes a man devil. Folks never understand folks they hate. Devil in the man has a long range of criminality. From the act, it is crystal clear that the accused had no love and affection even for the children of his younger brother Ramesh and his wife Kusum. The act was designed to extinguish the entire family. He also made a murderous assault on his father Namdeo and brother Ramesh. The only intention as explicit is to extinguish all the members of the family and grab the land which was in the name of his father and brother. The crimes were committed in a most brutal and dastardly fashion. The victims were taken unwarily when they were asleep. Thus, the brutality is writ large. It would be proper to say that the acts of the accused are not only beastly but ghastly in joined with extreme greediness. Evidently, the accused had fiendish pleasure in committing the crime. It need hardly be repeated that the punishment should be commensurate with the gravity of crime.

37. Considering the mode, method, manner and motive of the accused, horrendous features of the crime and hapless, helpless stated of the victims steel the heart of the law for a sterner sentence. Thus, looking at the crime and criminal the conclusion is irresistible, with the elimination of the accused, the society would be much better off and its safety will no longer be endangered. Indeed to award any other sentence except the death sentence will amount of complete failure of justice. Thus, the respondent/accused is unfit to live in the society. We, therefore, award him capital punishment. We are fortified by the dictum laid down by their Lordships of the Supreme Court in a case of Sarveshwar Prasad Sharma Vs. State of Madhya Pradesh, . The facts of that case were more or less identical. In that case too gruesome murders were committed to wipe out the entire family.

38. In the result, the criminal appeal No. 143 of 1989 presented by the State against acquittal is hereby allowed. The finding of acquittal as recorded by the Additional Sessions Judge, Akola is hereby set aside. We award the death sentence to the respondent/accused Vithal Namdeo Khanapure r/o Shivan Khurd. He be hanged till death.

In view of the capital punishment no separate sentence is awarded for the offences punishable under sections 326 and 323 of the Indian Penal Code.

39. Order accordingly.